GranCare, Inc., d/b/a Nightengale Nursing Care Center[1] ***and*** **Nightengale Employee Council.** Case 7–CA–38264

June 20, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On April 30, 1996,[2] the Regional Director for Region 7 of the National Labor Relations Board issued a complaint and notice of hearing alleging that the Respondent has engaged in and is engaging in certain unfair labor practices affecting commerce within the meaning of Sections 8(a)(1), (5), and 8(d) and Section 2(6) and (7) of the National Labor Relations Act. On May 14, the Respondent filed an answer admitting the factual allegations of the complaint. Thus, the Respondent admits that it informed the Nightengale Employee Council (the Charging Union) that it was "disestablishing" the Charging Union and would cease to recognize the Charging Union as the exclusive collective-bargaining representative of the unit employees; and also admits that, without the consent of the Charging Union, it unilaterally ceased giving effect to the fourth step of the grievance procedure contained in the collective-bargaining agreement then in effect between the Respondent and the Charging Union. The Respondent, however, denies that it violated the Act and asserts, as an affirmative defense, that it withdrew recognition from the incumbent Union pursuant to an agreement between GranCare, Inc. and Service Employees International Union (SEIU), dated November 6, 1995.

On June 17, the General Counsel, by counsel, filed a Motion for Summary Judgment with exhibits attached. Counsel for the General Counsel submits that the Respondent's answer reveals that there are no disputes with respect to any relevant or material facts that would necessitate an evidentiary hearing or an administrative law judge's decision.

On June 20, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's motion should not be granted. On July 2, the Respondent filed a response denying that it has committed any unfair labor practices, noting that it has admitted certain of the allegations in the complaint, but again asserting that its actions were taken pursuant to an agreement between itself and Service Employees International Union, dated November 6, 1995.

[1] The Respondent's name appears as the Respondent spells it.

[2] All dates hereafter are in 1996, unless otherwise noted.

Ruling on Appeal of Regional Director's Order Denying Motion for Intervention

On May 28, the Service Employees International Union Local 79 (Local 79) filed a motion for intervention in this proceeding. On June 7, the Regional Director issued an Order Denying Motion for Intervention. On June 27, Local 79 filed with the Board a request for special permission to appeal the Regional Director's order and filed an appeal, with exhibits attached, of the Regional Director's order. We grant permission to appeal the Regional Director's order and affirm the Regional Director's order.

Local 79 filed unfair labor practice charges against GranCare on August 30, 1995, alleging, inter alia, that GranCare maintained "illegal company unions" in violation of Section 8(a)(2) of the Act at various facilities, including Nightengale. After a complaint issued against another of GranCare's facilities,[3] GranCare and SEIU (Local 79's parent organization), signed an agreement effective from November 6, 1995, to April 30, 1998. The relevant part of the agreement reads as follows:

> GranCare and SEIU agree to settle outstanding NLRB charges and objections filed by SEIU in conjunction with elections conducted at Clinton-Aire and Bedford Villa facilities. Within two weeks of successful negotiation and ratification of this agreement, the three regional master agreements, and settlement of charges and objections filed by SEIU before the NLRB *related to these facilities*, [emphasis added] GranCare shall disband its employee councils in all [Michigan] facilities where they exist, including Clinton-Aire.[4]

Another agreement, dated January 29, also contained the same provision. Local 79 contends that resolution of this case will affect the enforceability of the agreement between itself and GranCare and that its interests are not adequately represented by the Respondent.

In his order the Regional Director found that Local 79 has no standing to intervene. He noted that Local 79 had withdrawn charges that the Nightengale Employee Council was unlawfully dominated by GranCare. Further, the Regional Director stated that any non-Board agreement between Local 79 and GranCare arising from alleged domination of employee councils at other facilities could not be given any weight here. We agree.

[3] This complaint did not include allegations against the Respondent's Nightengale facility, the facility involved here. Thus, the General Counsel has never alleged that the Respondent unlawfully dominated or interfered with the Nightengale Employee Council in violation of Sec. 8(a)(2) of the Act.

[4] The parties also agreed "to resolve outstanding disputes where possible."

We note that, as a general rule, an agreement or contract cannot abrogate the legal rights of a person or organization not party to that agreement. This basic principle of contract law is implicitly recognized, with regard to Board approved settlements in NLRB Casehandling Manual Part I, Section 10134.3 which provides, that:

> In every CA case in which the contemplated settlement provides for the disestablishment of a labor organization, or for the withdrawal and/or withholding of recognition from a labor organization, or for ceasing to give effect to part or all of an existing collective-bargaining contract with a labor organization that organization should be a party to the settlement. It must, before approval of the agreement,
>
> a. Be a party or signatory to the agreement itself; or
>
> b. File with the Regional Director a letter or other document stating that it has knowledge of the proceeding and of the contemplated settlement and that it waives any right to be a party to the proceedings; or to contest the settlement; or
>
> c. File with the Regional Director an affidavit signed by the last executive officer of the organization certifying that the organization is dissolved and out of existence and that it does not claim to represent any of the employees in the unit involved.
>
> Where, in a formal settlement, either b or c is used, the letter, document, or affidavit must be made part of the record (see sec. 10166.5).

Local 79 withdrew its charge that the Respondent here had violated Section 8(a)(2) of the Act and entered into a non-Board agreement with the Respondent to disestablish, inter alia, the Nightengale Employee Council. The Nightengale Employee Council was not a party to that agreement. We find that, under these circumstances, the agreement between the Respondent and SEIU, which essentially constitutes an agreement to violate Section 8(a)(5), as discussed below, does not give Local 79 a legal interest sufficient to confer standing to intervene in this proceeding. We therefore deny the motion for intervention. We thus affirm the Regional Director's Order Denying Motion.

Ruling on Motion for Summary Judgment

In its answer, the Respondent admits that it withdrew recognition from the Charging Union as the exclusive collective-bargaining representative of its employees in the appropriate unit, defined below, and ceased to give effect to the fourth step of the grievance procedure contained in their collective-bargaining agreement without the consent of the Charging Union. The Respondent, however, defends its actions on the grounds that it acted pursuant to an agreement between itself and Service Employees International Union, dated November 6, 1995.

For the reasons stated above, the agreement between the Respondent and SEIU does not provide a valid basis for the Respondent to withdraw recognition from the Charging Union, Nightengale Employee Council. Nor can that agreement be the basis for the Respondent's unilaterally ceasing to give effect to a step of a grievance procedure contained in Respondent's collective-bargaining agreement with the Nightengale Employee Council. At all times material, the Respondent and the Charging Union were parties to a collective-bargaining agreement covering employees in an appropriate unit. During the term of the contract, the Charging Union enjoyed an irrebuttable presumption of majority status. Consequently, the Respondent's withdrawing recognition from the incumbent Charging Union before the expiration of the contract, and its repudiation of a part of the grievance procedure, violated Section 8(a)(5) and (1) of the Act. See *Belcon, Inc.*, 257 NLRB 1341, 1346 (1981).

Thus, as we find that the affirmative defense submitted by the Respondent is without merit and because there are no material facts in dispute, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business at 11525 E. Ten Mile Road, Warren, Michigan, called the Nightengale facility, has been engaged in the business of operating nursing care centers for the disabled and elderly at various facilities in the State of Michigan. The Nightengale facility is the only facility involved in this proceeding. During calendar year 1995, a representative period, the Respondent, in conducting its business operations described above derived gross revenues in excess of $1 milliion and purchased and received medical supplies and other goods and materials valued in excess of $50,000 at its Nightengale facility and other Michigan facilities directly from points outside the State of Michigan.

We find that at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act, and that the Charging Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time certified nurse aides, restorative nursing aides, ward clerks, dietary aides, housekeeping employees, laundry employees, cooks, maintenance and activity aides employed at the Nightengale facility; but excluding all professional employees, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

Since about 1989 and at all material times, the Charging Union has been the designated exclusive collective-bargaining representative of the unit and, until early November 1995, was recognized as such by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective from October 1, 1995, to October 1, 1998.

About early November 1995, the Respondent, by its agent John Gaynier, informed the Charging Union that it was "disestablishing" the Charging Union and that it would thereby cease its recognition of the Charging Union as the exclusive collective-bargaining representative of the unit. Further, about early November 1995, the Respondent unilaterally ceased giving affect to the fourth step of the grievance procedure contained in the collective-bargaining agreement without the consent of the Charging Union. The grievance procedure relates to wages, hours, and other terms and conditions of employment of the unit and is a mandatory bargaining subject.

By withdrawing recognition from the Charging Union and by failing to give effect to the fourth step of the grievance procedure contained in the collective-bargaining agreement, the Respondent has unlawfully failed and refused, and is failing and refusing, to bargain in good faith with the Charging Union as the representative of its unit employees in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, GranCare, Inc., d/b/a Nightengale Nursing Care Center, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Union is a labor organization within the meaning of Section 2(5)of the Act.

3. The appropriate bargaining unit is:

> All full-time and regular part-time certified nurse aides, restorative nursing aides, ward clerks, dietary aides, housekeeping employees, laundry employees, cooks, maintenance and activity aides employed at the Nightengale facility; but excluding all professional employees, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by ceasing to recognize the Charging Union as the exclusive collective-bargaining representative of the Unit.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by ceasing to give effect to the fourth step of the grievance procedure which is contained in the collective-bargaining agreement effective from October 1, 1995, to October 1, 1998, without the consent of the Charging Union.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Thus, we shall require that the Respondent recognize and bargain collectively and in good faith with the Charging Union, and to give effect to the fourth step of the grievance procedure in the collective-bargaining agreement. Further, we shall require the Respondent to make employees whole for any loss of earnings or other benefits they may have sustained by reason of the unfair labor practices found above, as computed in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, we shall require the Respondent to post an appropriate notice to employees.

ORDER

The National Labor Relations Board orders that the Respondent, GranCare, Inc., d/b/a Nightengale Nursing Care Center, Warren, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully withdrawing recognition from the Nightengale Employee Council as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All full-time and regular part-time certified nurse aides, restorative nursing aides, ward clerks, dietary aides, housekeeping employees, laundry employees, cooks, maintenance and activity aides employed at the Nightengale facility; but excluding all professional employees, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

(b) Failing to give effect to the fourth step of the grievance procedure contained in its collective-bargain-

ing agreement with the Nightengale Employee Council effective from October 1, 1995, to October 1, 1998.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain collectively and in good faith with the Nightengale Employee Council.

(b) Restore the fourth step of the grievance procedure as contained in the collective-bargaining agreement with the Nightengale Employee Council, effective from October 1, 1995, to October 1, 1998.

(c) Make whole unit employees for any loss of earnings or other benefits they may have suffered as a result of the unfair labor practices found above in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Nightengale facility in Warren, Michigan, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 7, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engaged in any of these protected concerted activities.

WE WILL NOT unlawfully withdraw recognition from the Nightengale Employee Council as the exclusive collective-bargaining representative of the following appropriate unit:

All full-time and regular part-time certified nurse aides, restorative nursing aides, ward clerks, dietary aides, housekeeping employees, laundry employees, cooks, maintenance and activity aides employed at the Nightengale facility; but excluding all professional employees, office clerical employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT fail to give effect to the fourth step of the grievance procedure contained within the collective-bargaining agreement with the Nightengale Employee Council, which is effective from October 1, 1995, to October 1, 1998.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and bargain collectively and in good faith with the Nightengale Employee Council.

WE WILL restore the fourth step of the grievance procedure as contained in the collective-bargaining agreement effective from October 1, 1995, to October 1, 1998, with the Nightengale Employee Council.

WE WILL make employees whole for any loss of earnings or other benefits they may have sustained by reason of the unfair labor practices found above, with interest.

GRANCARE, INC., D/B/A NIGHTENGALE NURSING CARE CENTER